No. 87-1317

In the Supreme Court of the United States

OCTOBER TERM, 1987

WILLIAM J. GUSTE, ATTORNEY GENERAL OF LOUISIANA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
ROGER J. MARZULLA
Assistant Attorney General
EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Section 8(g)(3) of the Outer Continental Shelf Lands Act, as amended by Section 8003, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 149 (to be codified at 43 U.S.C. 1337(g)(3)), requires the Secretary of the Interior to enter into unitization or other forms of revenue-sharing agreements with a coastal state whenever the state requests such an agreement in order to protect itself from the alleged drainage of oil and gas by federal lessees on the outer Continental Shelf.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A40) is reported at 832 F.2d 935. The opinion of the district court (Pet. App. C1-C56) is reported at 656 F. Supp. 1310.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on November 25, 1987. A petition for rehearing was denied on December 23, 1987 (Pet. App. B1-B2). The petition for a writ of certiorari was filed on February 8, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331 *et seq.*, the Secretary of the In-

terior may issue oil and gas and other mineral leases for the submerged lands of the outer Continental Shelf (OCS). The Submerged Lands Act, 43 U.S.C. 1301 *et seq.*, grants the coastal states the right and power to manage and use the submerged lands adjoining their respective coasts. For most coastal states, including Louisiana, the grant extends seaward for three miles. Respondent Samedan Oil Corporation is the operator of a federal OCS lease, issued in 1983, for a tract adjacent to Louisiana's offshore boundary. The federal tract adjoins two state tracts that Louisiana had earlier leased to petitioners Cashco Oil Company, Seneca Resources Corporation, and Pelto Oil Company. Prior to issuing the federal lease, the Secretary offered the Governor of Louisiana the opportunity to enter into an agreement to unitize the federal tract with adjacent state lands. The Governor rejected the offer, but on April 16, 1986, he subsequently sent a letter to the Secretary requesting a unitization agreement concerning the particular tracts at issue here.

2. On April 24, 1986, petitioner Louisiana brought this action (in which petitioner state lessees subsequently intervened) against the federal government and Samedan in the United States District Court for the Western District of Louisiana. The complaint stated, inter alia, that the adjacent federal and state tracts are underlain by three individual, producing common reservoirs and that approximately 84% of the total original recoverable reserves in the three reservoirs underlie Louisiana's submerged lands and 16% underlie the federal domain (Pet. App. A5, C10). According to the complaint, Samedan, with the Secretary's acquiescence, was producing a disproportionate share of the resources (*id.* at C10-C11). The complaint alleged "that the federal government through Samedan is draining the state's mineral resources * * * in

violation of the OCSLA, 43 U.S.C § 1337(g) ('Section 8(g)'), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-272, Sec. 8002, which imposes a duty on the Secretary of the Interior to effect unitization of common hydrocarbon bearing areas" (Pet. 8).

The district court entered summary judgment in favor of respondents (Pet. App. C1-C56). The court concluded (*id.* at C7-C8, C19-C28) that the Secretary has discretionary authority under Section 8(g) of the OCSLA to negotiate and enter into unitization agreements or analogous royalty-sharing agreements with the states, but is not required to do so (to be codified at 43 U.S.C. 1337). The court also found (Pet. App. C7-C8, C19-C28) that Congress intended that Section 8(g)(2), which provides for a 27%-73% division between the state and federal governments, respectively, of lease revenues from oil and gas extracted on the OCS between three and six miles from the coast would generally compensate the coastal states for, among other things, drainage losses (see § 8(g)(2), as amended by Section 8003, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 148-149, to be codified at 43 U.S.C. 1337(g)(2)).

3. The court of appeals affirmed (Pet. App. A1-A40). The court concluded that the Secretary's construction of Section 8(g) is supported by both the plain meaning of Section 8(g)(3) and its legislative history. Section 8(g)(3), the court noted (Pet. App. A19-A23), is cast in permissive rather than mandatory language, and the court found (*id.* at A20-A22) that the events leading up to the 1986 revision of Section 8(g) establish that the purpose of that amendment—to settle permanently disputes over OCS revenues—would be defeated if, as petitioners contend, Section 8(g)(3) were to be interpreted as compelling the Secretary to enter into unitization agreements with coastal states.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. The court of appeals correctly rejected petitioners' contention that the Secretary is required to enter into an unitization agreement with the Governor of any coastal state whenever a common potentially hydrocarbon-bearing area may underlie the federal and state boundary. The statutory language explicitly shows that the Secretary is under no such mandatory duty. Section 8(g)(3) of the OCSLA provides that "the Secretary and the Governor of the coastal State *may* enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law" (to be codified at 43 U.S.C. 1337(g)(3) (emphasis added)). The provision also expressly contemplates the possibility that no such agreement will be reached. It provides that "[i]f the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts" (*ibid.*)[1]

Furthermore, as the court of appeals recounted (Pet. App. A10-A22), the legislative history of the 1986 revision of Section 8(g)(3), which added the pertinent language, supports its literal meaning. Prior to 1986, Section 8(g) (43 U.S.C. 1337(g)) expressly required the Secretary to offer

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[1]Petitioners' reliance (Pet. 17-19) on the word "shall" in the first sentence of Section 8(g)(3) is misplaced. As the court of appeals explained (Pet. App. A22 (footnotes omitted)), "[w]hile the notification requirements of section 8(g)(3) are cast in mandatory language, the revenue sharing provision is clearly permissive." Thus, the juxtaposition of the two sentences corroborates, rather than detracts from, the significance of the permissive formulation that is controlling here.

the coastal states the opportunity to enter into a revenue-sharing agreement and further required that, in the absence of such an agreement, the Section 8(g) revenues would be deposited in an escrow account pending a determination of their fair and equitable disposition by a district court. See Outer Continental Shelf Lands Act Amendments of 1978, Pub. L. No. 95-372, § 205(b), 92 Stat. 645-646. As described by the court of appeals (Pet. App. A20), however, under that statutory scheme "the Secretary and the Governors of coastal states were in constant disagreement concerning the fair and equitable disposition of OCS revenues, resulting in $6.1 billion balance in special treasury accounts." The purpose of the 1986 amendment, which eliminated those provisions, was to settle the entire Section 8(g) issue and preclude any future litigation concerning revenues from the Section 8(g) tracts (see Pet. App. A20-A21). And, specifically, as is reflected in remarks made by Senator Johnston, a sponsor of the legislation, Congress understood that the new language it was adding to Section 8(g)(3) is permissive in nature. See 131 Cong. Rec. 31911 (1985) (discussing language identical to that enacted in Section 8(g)(3)) ("Mr. President, it is a permissive right of the States to seek money. That is all they have in their amendment. There is no right granted to a State. And let us make that clear to start with."). Significantly, moreover, Congress specifically declined to adopt language that would have authorized coastal states to compel the Secretary to unitize common reservoirs (see Pet. App. A38 n.15).

Hence, there is no merit to petitioners' claim (Pet. 23-24) that the court of appeals failed to examine "the statutory context and legislative history to determine whether Congress intended to establish an affirmative

duty."[2] The court fully considered Section 8(g)(3)'s statutory context and legislative history and correctly concluded that petitioners' "construction of section 8(g)(3) would emasculate * * * clear congressional policy by engaging the courts in further litigation over revenue sharing and the determination of whether the Secretary has negotiated unitization agreements in good faith" (Pet. App. A22).[3]

Finally, likewise lacking in merit is petitioners' assertion (Pet. 28) that "[i]f Section 8(g)(3) imposes no duty on the Secretary, he has no motive to unitize in any case in which a revenue advantage can be gained through drainage." As petitioners concede (Pet. 12), "[h]istorically, problems of net drainage across federal-state boundaries have been met through a practice of unitization of common reservoirs by federal and state agencies." In the absence of any statutory obligation, the Secretary and Louisiana entered into numerous unitization agreements long before the 1978 and 1986 Amendments were enacted (see *id.* at 13). Although the Secretary has, as in this case, decided not to enter into reciprocal revenue-sharing agreements with Louisiana on a piecemeal tract-by-tract basis, he remains interested in

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[2] For this reason, contrary to petitioners' claim (Pet. 4, 19-24), the decision of the court of appeals in this case does not create an "analytical conflict" with either the First Circuit's decision in *Massachusetts* v. *Andrus*, 594 F.2d 872 (1979) or the Tenth Circuit's decision in *Nevada Power Co.* v. *Watt*, 711 F.2d 913 (1983). Neither of those decisions concerned the meaning of "may" in Section 8(g)(3).

[3] Petitioners mischaracterize their claim in asserting (Pet. 35) that "[t]his is not a dispute over OCS revenues or compensation." The second sentence of Section 8(g)(3), upon which petitioners rely, concerns federal-state agreements "to divide the *revenues* from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement" (to be codified at 43 U.S.C. 1337(g)(3) (emphasis added)). Hence, petitioners' claim is, at bottom, a dispute over Section 8(g) revenues.

reaching an agreement with Louisiana that covers substantial portions of the state-federal boundary.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROGER J. MARZULLA
Assistant Attorney General

EDWARD J. SHAWAKER
ROBERT L. KLARQUIST
Attorneys

APRIL 1988

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[4] In a letter to the Governor of Louisiana dated May 1, 1987, the Assistant Secretary of the Interior—Land and Minerals Management, stated that Interior had decided not to compel unitization of Samedan's tract, but added (U.S. C.A. Br. Attachment 3):

> We remain open, however, to exploring with your State a general, reciprocal royalty-sharing agreement under section 8(g)(3) of the OCS Lands Act whenever common reservoirs are not unitized and substantial net drainage cannot be counteracted through our other regulatory authorities. This agreement could apply to common ununitized State/Federal reservoirs in the West Delta 17 field. A royalty-sharing agreement is, in effect, a unitization of the lessors' royalty interests. The rights of the lessees under their leases remain unaffected. A royalty-sharing agreement is a means of protecting the fiscal interests of both sovereigns in those cases when compelled unitization is inappropriate.

Louisiana has, throughout the course of this litigation, carefully avoided any admission that Section 8(g)(3) imposes any obligation upon it to unitize or to enter into revenue-sharing agreements with the Secretary where the State's lessees are draining resources from federal OCS lands.

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